

Mar 15, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Klickitat Public Utility
District; Northern Wasco
County People's Utility
District; and Liberty Mutual
Insurance Company, as Subrogee
of Klickitat Public Utility District; Northern
Wasco County People's Utility District and
McNary Dam Washington Shore Fishway
Hydroelectric Project,
Plaintiffs,

v.

Timberland Equipment Limited
and Diversified Inspections/
Independent Testing
Laboratories, Inc.,
Defendants.

No. 1:17-CV-03197-SAB

**ORDER DENYING
DEFENDANT TIMBERLAND'S
RULE 12 MOTION TO
DISMISS**

Before the Court is Defendant Timberland Equipment Limited's Rule 12 Motion to Dismiss, ECF No. 12. The motion was heard without oral argument. Defendant Timberland Equipment Limited ("Timberland") is represented by Gregory G. Wallace. Plaintiffs are represented by Bradley C. Crockett, Paul B. Hines, and Glenn Mattar.

**ORDER DENYING DEFENDANT TIMBERLAND'S RULE 12 MOTION
TO DISMISS ~ 1**

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2 **Factual Background**

3 This action involves the collapse of a 65-ton capacity WMJ crane. It is
4 alleged in the Complaint that Defendant Timberland designed and manufactured the
5 crane.

6 In October, 2015, a turbine used in a hydroelectric dam was taken off-line for
7 maintenance and to replace a runner. The crane, which was installed in 1998, was
8 used for the project. On November 18, 2015, while lifting the head cover/runner
9 assembly out of the powerhouse of the dam, the crane collapsed, causing damage
10 to itself and other property. Plaintiffs' expert believes the crane failed and collapsed
11 due to an improper and defective weld between the dual-sheave pulley assembly
12 and the pivot tube for boom pulley support. Also, Plaintiffs allege that Defendant
13 Diversified Inspections/Independent Testing Laboratories, Inc., ("Diversified")
14 performed an inadequate annual safety inspection on the crane in March, 2015.

15 Damages from the collapse total over \$3 million. Plaintiff Liberty Mutual
16 Insurance Company paid almost \$3 million on the claim and as a result of these
17 payments has become subrogated, to the extent of its payments, to Plaintiffs' rights
18 as against Defendants. Also, the remaining Plaintiffs incurred uninsured
19 losses/deductibles totaling \$230,910.55 as a result of the collapse.

20 **Procedural Background**

21 Plaintiffs are bringing two claims against Defendant Timberland: (1)
22 negligence and/or gross negligence; and (2) strict products liability under the
23 Washington Products Liability Act (WPLA); and three claims against Defendant
24 Diversified: (3) negligence and/or gross negligence; (4) breach of contract; and (5)
25 breach of express and or implied warranty. ECF No. 1.

26 In its Motion, Defendant Timberland asks the Court to dismiss the negligence
27 claim because the negligence claim is subsumed under the Washington Products
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1 Liability Act claim. Plaintiffs agree that if the WPLA claim is viable, then the
2 negligence claim should be dismissed, but Plaintiffs assert that whether the WPLA
3 claim is viable remains on open question. Until that question is decided, the Court
4 should not dismiss the claim.

5 The Court agrees with Plaintiffs' assessment of the issue. Notably, in
6 *Bostwick v. Ballard Marine, Inc.*, 127 Wash. App. 762 (2005), the plaintiff brought
7 both a negligence claim and a Washington Products Liability Act claim. *Id.* at 573.
8 At issue in that case was whether a defendant was in the business of leasing for
9 purposes of the WPLA at the time the plaintiff was injured. *Id.* In ruling on a
10 summary judgment motion, the trial court held that the defendant was not a product
11 seller under the WPLA and also denied the negligence claim. *Id.* at 574-77. The
12 Washington Court of Appeals held the trial court was correct in determining the
13 WPLA does not apply, but erred in dismissing the negligence claim because one
14 who is not a product seller under the Act may still be liable for negligence. *Id.*
15 *Bostwick* stands for the proposition that both the negligence claim and WPLA may
16 proceed in tandem until it is determined whether the WPLA applies.

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**ORDER DENYING DEFENDANT TIMBERLAND'S RULE 12 MOTION
TO DISMISS ~ 3**

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2 Accordingly, **IT IS HEREBY ORDERED:**

3 1. Defendant Timberland's Rule 12 Motion to Dismiss, ECF No. 12, is
4 **DENIED.**

5 2. Plaintiffs' Motion for Leave to File a Sur-reply, ECF No. 18, is
6 **DENIED.**

7 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
8 and forward copies to counsel.

9 **DATED** this 15th day of March 2018.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

16 Stanley A. Bastian
17 United States District Judge
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